IN THE

Supreme Court of the United States

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October Term, 1971

No. 71-[illegible]

GUMEN, *et al.*,

Petitioners,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-153

GUMEN, *et al.*,

Petitioners,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF RESPONDENT IN OPPOSITION.

Preliminary Statement.

The petitioners seek a writ of certiorari from this Court to the California Supreme Court to review its decision holding that California Probate Code, Section 1026, which requires a nonresident alien heir to appear and demand his inheritance within five years after succession thereto, or lose all right to such inheritance, is constitutional; that the petitioners had not appeared and demanded their inheritances within the five years required by said California Probate Code Section 1026; that the petitioners therefore lost all right to said inheritances; and that at the end of said five years said inheritances escheated to the State of California as provided by said Probate Code, Section 1026. The opinion

of the California Supreme Court, filed June 10, 1971, is reported at 5 Cal. 3d 62. The Petition for Writ of Certiorari was filed on September 9, 1971.

Jurisdiction.

The petitioners invoke the jurisdiction of this Court pursuant to Title 28, Section 1257 (3), United States Code.

Questions Presented.

1. Whether California Probate Code, Section 1026, which limits the right of a nonresident alien heir to succeed to a vested interest in a California decedent's estate subject to a condition subsequent that he appear and demand his inheritance within five years from the date of the death of the decedent, while placing no such condition subsequent upon the estate succeeded to by any other heir, denies the nonresident alien heir the equal protection of the law and the due process of law.

2. Whether California Probate Code, Section 1026, which limits the right of a nonresident alien heir to succeed to a vested interest in a California decedent's estate subject to a condition subsequent that he appear and demand his inheritance within five years from the date of the death of the decedent, while placing no such condition subsequent upon the estate succeeded to by any other heir, is an unconstitutional infringement upon the exclusive power to regulate commerce with foreign nations which is granted to Congress by Article I, Section 8 of the United States Constitution.

Statement of the Case.

On December 25, 1961, John Horman died intestate in California, leaving an estate in excess of $450,000. An administrator of the estate was appointed by the Court in January of 1962, and in January of 1965 the State of California filed a petition seeking from the probate court a determination of heirship, alleging that there were no heirs to take the estate, and asking that it be distributed to the State as escheated property pursuant to the laws of the State of California.

Within five years from the date of death, twenty persons, all citizens and residents of the USSR, claiming to be heirs of the decedent "appeared and demanded" their interests in the estate by filing, by their attorney, statements of interest in the heirship proceeding then pending in the probate court.

On March 17, 1967, more than five years after the date of the death of the decedent, a statement of interest was filed on behalf of the four petitioners herein, all of whom were citizens and residents of the USSR.

The first trial of the question of heirship resulted in an order holding that the claimants had not proved their relationship to the decedent and their entitlement to the estate, and that the estate should be distributed to the State of California as escheated property. This order was reversed on appeal for abuse of the discretion of the trial judge in not granting the claimants' motion for a new trial. (*Estate of Horman,* 265 Cal. App.2d 796 (1968).)

The State filed an answer to the claim of the petitioners herein, pointing out that they had not appeared and demanded any shares of the estate within five years from the date of the death of the decedent, and that therefore any rights in the estate to which they might have succeeded had terminated and their interests escheated to the State.

The retrial of the question of heirship resulted in an order holding that each of the claimants was an heir of the decedent and entitled to take a portion of his estate by succession. The court ruled that the petitioners herein had not lost their interests in the estate by failing to appear and demand such interests within five years from the date of the death of the decedent as provided by California Probate Code, Section 1026, because *Estate of Gogabashvele*, 195 Cal.App.2d 503 (1961), decided in 1961 and overruled in 1966, holding that lack of reciprocal rights of inheritance between the United States and the USSR prevented citizens and residents of the USSR from succeeding to that estate, would, during the period of its viability, have rendered an appearance and demand by the petitioners here an idle act, and would have prevented them from obtaining any effective relief in the courts of the State of California, thus tolling the statute during that period.

On appeal by the State of California, the order was reversed by the Supreme Court of the State of California insofar as it held that the petitioners herein were not barred from taking a share of the estate by virtue of California Probate Code, Section 1026, and the trial court was instructed to enter judgment that the State of California was entitled by escheat to the interests to which the petitioners here would have been entitled had

they appeared and demanded such interests within five years from the date of the death of the decedent as provided in said Probate Code, Section 1026. (*Estate of Horman*, 5 Cal.3d 62 (1971).)

ARGUMENT.

I.

The California Law Limiting the Right of a Nonresident Alien Heir to Succeed to a Vested Interest in a Decedent's Estate Subject to the Condition That He Appeal and Demand His Inheritance Within Five Years From the Date of the Death of the Decedent, While Placing No Such Condition Upon the Estate Succeeded to by Any Other Heir, Violates Neither the Equal Protection nor the Due Process Provisions of the Fourteenth Amendment to the United States Constitution.

The petitioners contend that the California law which grants to nonresident alien heirs only a vested interest in the estate of a decedent subject to the condition subsequent that they appear and demand their inheritances within five years from the date of the death of the decedent, while placing to such condition upon the estate succeeded to by any other heir, violates their federal constitutional right to the equal protection of the laws and the due process of law guaranteed to them by the Fourteenth Amendment of the United States Constitution.

The law of nations and of the United States recognizes the liberty of every government to give to foreigners only such rights touching property within its territory as it may see fit to bestow, and in the United States this authority is primarily in the States (*Patsone v. Pennsylvania*, 232 U.S. 138, 145-146 (1913)), subject to dominant rights given by the constitution to the federal government. (*Zschernig v. Miller*, 389 U.S. 429, 440 (1968); see *Blythe v. Hinckley*, 127 Cal. 431, 436-437 (1900); Whiteman, Digest of International Law, Vol. 8, pp. 462-463 (1967).) Subject to

such federal rights, the state has full power to regulate the matter of the descent and distribution of decedents' estates within its borders. Nothing in the federal constitution forbids the legislature of a state to limit, condition, or even abolish the right to succession within its jurisdiction. (*Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942).)

The equal protection guarantee of the Fourteenth Amendment of the United States Constitution applies by its very language only to "any person within its [the state's] jurisdiction," and there is some indication that it is inapplicable to nonresident aliens. (*Johnson v. Eisentrager*, 339 U.S. 763, 771 (1949).) However, the petitioners here assert that the granting of an interest in the decedent's estate, albeit a conditional one, to them brought them within the jurisdiction of the state and guaranteed to them the equal protection of the laws.

Here, the only property interest which the State of California bestowed upon the petitioners was a conditional estate, subject to the contingency that if they failed to appear and demand it within five years after the date of the death of the decedent, their rights ceased. The state action which gave them the right limited the right, as it could constitutionally do. No state action took anything away from them—they did not have an unconditional right to begin with, and their own inaction, not the action of the state, defeated it. Therefore, when they first appeared in the State of California they had no property rights left therein, and therefore, we submit, there was no basis upon which they could assert any rights to the equal protection of the law.

The equal protection clause creates no new rights; it does not guarantee any minimum of protection, but

merely requires that persons similarly situated receive equal treatment. (*Skinner v. Oklahoma*, 316 U.S. 535, 540-542 (1942).) The only equality guaranteed is equality under the same conditions, and among persons similarly situated. The legislature may make a reasonable classification of persons and activities, and pass special legislation applying to certain classes. The classification must not be arbitrary, but must be based upon some difference in the class having a substantial relation to a legitimate object to be accomplished. (*Morey v. Doud*, 354 U.S. 457, 465 (1957).) It must be presumed that any statutory discrimination between classes which are in fact different is relevant to a permissible legislative purpose, and it will not be deemed to be a denial of equal protection if any state of facts could be conceived which would support it. (*Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552, 557-558 (1947); *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961).)

The California law granting to nonresident aliens only a vested right to a decedent's estate, subject to the condition that he appear and demand it within five years, has two purposes, both of which, we submit, constitute legitimate state concerns. The state has a legitimate concern that property within its borders should have an ascertainable title within a reasonable period of time so that it can be sold, developed and otherwise dealt with, and the statute fixes a time at which title can be definitely ascertained. The second purpose is the state's preferring itself, quit permissibly, over nonresident aliens who have not appeared, from lack of interest or otherwise, and demanded their interest within five years.

The distinction between nonresident alien heirs and other heirs is rationally related to these purposes. Citi-

zens and resident aliens are likely to have substantial contacts and relationships with the state, directly or indirectly through the federal and state governments which nonresident aliens lack completely. In recognition of these connections and relationships, it is reasonable for the state to defer its power of escheat as to citizens and resident aliens for a longer period than as to nonresident aliens.

The existence of unascertainable property titles constitutes a problem for and a burden on the state, and final escheat of the property to the state in an ascertainable time contributes to its relief from such problem and burden. And it is not unreasonable for the state, in deference to and recognition of its more probable relationship to and connection with citizens and resident aliens, to allow the latter persons a somewhat longer period in which to claim their successions prior to final escheat than that accorded to nonresident aliens.

Therefore, even though it should properly be held that the petitioners herein were not persons protected by the equal protection clause because they had neither property nor presence within the state at the time of their first appearance therein, it must be held, we submit, that they were not in any event, denied the equal protection of the laws, because the law which classified them and gave them rights of succession more limited than those given to other persons is based on a reasonable difference in the class which they represent which has a substantial relation to a legitimate object.

As the state has, as set forth above, the power to withhold the right of succession to all, but has seen fit to allow a nonresident alien to succeed to a vested but conditional property interest, we submit that the

nonoccurrence of the condition, particularly when caused by the nonaction of the recipient of the interest, and the consequent divestment of that interest, could not, and did not here, deprive a nonresident alien of the due process of law required by the constitution.

II.

The California Law Limiting the Right of a Nonresident Alien Heir to Succeed to a Vested Interest in a Decedent's Estate Subject to the Condition That He Appear and Demand His Inheritance Within Five Years From the Date of the Death of the Decedent, While Placing No Such Condition Upon the Estate Succeeded to by Any Other Heir, Does Not Infringe Upon the Exclusive Power of Congress to Regulate Commerce With Foreign Nations.

The petitioners assert that California Probate Code, Section 1026, violates the fundamental requirements of International Law, embarrasses our federal government in its dealing with foreign nations, creates difficulties with foreign powers and detrimentally affects our foreign relations, and is therefore an unconstitutional infringement upon the exclusive power to regulate commerce with foreign nations which is granted to Congress by Article I, Section 8 of the United States Constitution.

The petitioners point out that Restatement, Foreign Relations Law 2d, sections 166 and 185, provide that an alien may not be discriminated against even though he is not a resident if he has lawfully acquired an interest in property subject to the jurisdiction of the state, and that property of a nonresident alien may be taken only if a reasonable provision is made for payment of just compensation. They contend that California Probate Code, Section 1026 which requires a nonresident

to appear and demand his inheritance within five years from the date of the death of the decedent deprives them of a property right without compensation, that it is therefore a violation of International Law, and consequently constitutes a violation of the exclusive right of Congress to regulate commerce with foreign nations.

Here, as has been set out in Point I hereof, the only property interest which the petitioners acquired was one which was a conditional estate, subject to the contingency that if they failed to appear and claim the same within five years, their rights ceased. The state action which gave them the right limited the right. No state action took anything away from them—they did not have an unconditional right to begin with, and their own inaction, not that of the state, defeated it.

Therefore, we submit, no "injury" to an alien committed by a state, such as that referred to in the Restatement, Foreign Relations Law 2d, referred to by the petitioners, was committed here.

The next questions presented is, then, to what extent the state may prescribe limitations on the descent of estates to aliens without interfering with the federal government's exclusive power to regulate foreign affairs. It is not every real or possible effect on foreign relations which is forbidden to the states. Thus, in *Clark v. Allen,* 331 U.S. 503, 517 (1949), an "incidental" or "indirect" effect was held to be constitutional. Further, a state may impose a tax upon the succession by aliens to property within its jurisdiction which tax is not applied to citizens of the United States (*Magoun v. Illinois Trust & Savings Bank,* 170 U.S. 283), and may discriminate between nonresident aliens and those residing in the United States. (*Moody v. Hagen,* 36 N.D. 471 (1917).) Thus, it is not every act of the state

which treats aliens in a manner different from that with which it treats citizens or resident aliens which constitutes an interference in the power of the federal government to regulate foreign affairs.

We submit that the simple requirement of Probate Code, Section 1026 that in order to eliminate the conditional nature of the estate to which he has succeeded, a nonresident alien must appear and demand such estate within five years could have at the very most an "incidental" and "indirect" effect on foreign affairs, which is not an unconstitutional action of the state.

The claimants' assertion that it would be so embarrassing to envoys of the United States to try to explain why some heirs are entitled to inherit and some are not, because of the provisions of Probate Code section 1026, that the ability of the United States to regulate foreign affairs would be seriously impaired is, we submit, speculative in the extreme. Our envoys have presumably been explaining without unconstitutional embarrassment for years why an alien in New Hampshire has been unable to inherit real property there (*Lazarou v. Moraros* (New Hampshire) 143 A.2d 669 (1958)), while another alien may be able to inherit similar property in California.

The cases cited by the claimants in support of their argument that the code section in question is unconstitutional interference with the power of the federal government are those in which it was held that the state action did in fact interfere with some exclusive power of the federal government. Thus, for example, in *Bethlehem Steel Corp. v. Board of Commissioners,* 276 A.C.A. 266 (1969), the law imposed an embargo on foreign products, action which clearly and directly affected foreign affairs. The state action in *Purdy & Fitzpatrick v.*

State of California, 71 A.C. 587 (1969), interfered with the federal right to regulate immigration. *Zschernig v. Miller,* 389 U.S. 429 (1968), held that the application of the Oregon statute in a way which allowed the courts to evaluate the administration of foreign law, the credibility of diplomatic statements, the general policies of the foreign government and other criteria, which were clearly foreign affairs matters within the enumerated powers of the national government, was unconstitutional. The Court did not hold that state action which affected alien inheritances was unconstitutional *per se.* (See *State Probate Laws and Alien Heirs—The Zschernig Legacy,* 21 Baylor Law Review 450; *Alien Succession Under State Law: The Jurisdictional Conflict,* 20 Syracuse Law Review, 661; *Alien Inheritance Statutes and the Foreign Relations Power,* Duke Law Journal, Vol. 1969:153; *Nonresident Alien Inheritance Statutes and Foreign Policy—a Conflict?,* 47 Oregon Law Review 390.)

The law here under attack applies to nonresident aliens of every nationality whatsoever, indiscriminately, unless superceded by treaty. (*E.g., Estate of Romasis,* 191 Cal. 740.) Indeed, the federal government implicitly recognizes the right and habit of the various states to regulate inheritance and ownership of property within such states, by including in many treaties specific provisions regarding inheritance by nationals of the contracting parties. (See, TREATY PROVISIONS IN FORCE BETWEEN THE UNITED STATES OF AMERICA AND OTHER COUNTRIES RELATING TO RIGHTS OF INHERITANCE, ACQUISITION, AND OWNERSHIP OF PROPERTY. Compiled by the Office of the Assistant Legal Adviser for Treaty Affairs, United States Department of State, June 1, 1971.)

We submit, therefore, that California Probate Code, Section 1026 cannot be characterized as having a direct impact upon foreign relations, nor will it adversely affect the power of the central government to deal with foreign relations. At most, its effect upon foreign relations can be only incidental and indirect, and therefore it does not unconstitutionally impinge upon the exclusive and plenary power of the federal government to regulate foreign affairs.

Conclusion.

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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